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# Half-way House Fiduciary Duties:

## *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd*

### A. INTRODUCTION

In *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd*,<sup>1</sup> the Court of Appeal considered, inter alia, two questions relating to the fiduciary duties of financial intermediaries: (i) in what circumstances an introducing broker owes fiduciary duties to its clients, and (ii) whether the broker's failure to disclose the exact quantum of its commission amounted to a breach of the no-conflict fiduciary rule. The Court of Appeal agreed with the trial judge that fiduciary duties arose in this case, but reversed his decision on the point of breach of fiduciary duty. It ruled that, when a client knows or should have known that the broker is remunerated by the other party, the no-conflict rule does not require the broker to disclose to its client the full amount of the commission. In other words, when the fiduciary's benefit is only "half-secret", the default requirements of full disclosure and informed consent are not triggered. This analysis will argue that the court's reasoning in finding a fiduciary relation and its treatment of this halfway-house case are problematic.

### B. THE FACTS

Medsted was an introducing broker in the field of contracts for difference ("CFDs"). Its role was to introduce investors to second-tier providers of CFDs, which in turn dealt with first-tier providers. Due to the nature of these derivative instruments, investors are not allowed to deal directly with first-tier providers. Medsted formed a business relationship with Collins Stewart ("CS", subsequently acquired by Canaccord), a second-tier provider, whereby the former introduced clients to the latter, in exchange for a share of the commission and funding rebate that clients paid directly to CS. Representatives of both parties agreed orally that the clients should not be told of the split of the charges between Medsted, CS and the first-tier provider.<sup>2</sup>

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<sup>1</sup> *Medsted Associates Limited v Canaccord Genuity Wealth (International) Limited* [2019] EWCA Civ 83 (hereinafter "*Medsted CA*"), reversing in part *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2017] EWHC 1815 (Comm); [2018] 1 WLR 314 (hereafter "*Medsted HC*")

<sup>2</sup> *Medsted HC*, paras [24], [42], [102].

In particular, Medsted was adamant that clients remain unaware of the division of charges,<sup>3</sup> and refused to disclose this information to the clients when asked.<sup>4</sup> Upon discovering (or suspecting)<sup>5</sup> that Medsted received part of the commissions and fees, the investors expressed their dissatisfaction with the current arrangements.<sup>6</sup> Eager to keep its clients, CS secretly bypassed Medsted and traded with the investors directly.<sup>7</sup>

Medsted sued CS to recover the share of the commissions it would have been entitled to, alleging that it breached the non-circumvention clause of their agreement.<sup>8</sup> CS's defence was that, after discovering the quantum of Medsted's commission, the clients decided to cut out the broker and deal directly with CS.<sup>9</sup>

### C. THE COURT DECISIONS

At trial, the judge held for Medsted.<sup>10</sup> Teare J found that CS breached its contractual obligation to disclose regularly to Medsted all trading information of the introduced clients, so that Medsted could calculate the share of profits it was owed.<sup>11</sup> Moreover, CS was in breach of contract by circumventing Medsted and doing business directly with the investors, which deprived Medsted of its right to commission and rebate on those trades.<sup>12</sup> Nevertheless, the judge found that the "root of the damage"<sup>13</sup> was Medsted's own breach of fiduciary duty to its clients.

In analysing the relationship between Medsted and its clients, Teare J began by observing that it was not the paradigm agency relation, where one party acts on behalf of the other and has the power to affect the latter's relations with third parties.<sup>14</sup> Medsted was only an introducing broker, and the clients formed their contracts with CS directly.<sup>15</sup> Nevertheless, Medsted could still be a fiduciary if the core characteristics of fiduciary relations were

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<sup>3</sup> *Medsted HC*, paras [45], [96].

<sup>4</sup> *Medsted HC*, para [100].

<sup>5</sup> The judge makes no explicit finding on this matter.

<sup>6</sup> *Medsted HC*, para [48].

<sup>7</sup> *Medsted HC*, paras [48]-[50].

<sup>8</sup> *Medsted HC*, para [86].

<sup>9</sup> *Medsted HC*, para [131].

<sup>10</sup> Although a total of eleven issues were raised, this analysis will focus only on the parts relevant to the existence and breach of fiduciary duties.

<sup>11</sup> *Medsted HC*, paras [86], [130].

<sup>12</sup> *Medsted HC*, para [132].

<sup>13</sup> *Medsted HC*, para [135].

<sup>14</sup> *Medsted HC*, para [89].

<sup>15</sup> *Ibid.*

present. In deciding whether that was the case, the judge referred to *Hurstanger Ltd v Wilson*<sup>16</sup> and *McWilliam v Norton Finance*,<sup>17</sup> where it was held that an introducing agent would be a fiduciary only if acting in a capacity which involved the repose of trust and confidence.<sup>18</sup> In the case at hand, the clients reposed trust and confidence in Medsted,<sup>19</sup> who impliedly represented to them that the terms offered by CS were competitive.<sup>20</sup> The elements of reliance and vulnerability were also present. Since the investors could not deal directly with a first-tier provider, they relied on Medsted to introduce them to the second-tier provider, and were thus vulnerable to any disloyalty by it.<sup>21</sup> Thus, Medsted owed a fiduciary duty to the clients “to be honest, fair and transparent, to act in their best interests and not to mislead them.”<sup>22</sup> It had a duty not to place itself in a position of conflict of interest without the clients’ prior informed consent. By failing to disclose its share of the commission and rebate, and thus failing to secure the clients’ informed consent, Medsted’s benefit was a secret profit obtained in breach of fiduciary duties.<sup>23</sup> It is important to note that the breach did not consist in failing to disclose the fact that Medsted was receiving a portion of the benefits. The judge held that the clients “must have assumed”<sup>24</sup> that Medsted was being compensated through the commission paid to CS, since they paid nothing to Medsted for its services.<sup>25</sup> Medsted breached its fiduciary duty by not disclosing the actual quantum of the benefit, which prevented the investors giving their informed consent.<sup>26</sup> Although CS’s breach of contract was a cause of Medsted’s loss,<sup>27</sup> the root cause of the damage was Medsted’s own breach of fiduciary duty. Hence, the judge only awarded nominal damages for breach of contract, on the ground that the court should not assist Medsted to profit from its own breach of fiduciary duty.<sup>28</sup>

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<sup>16</sup> [2007] EWCA Civ 299; [2007] 1 WLR 2351, paras [33]-[44] (hereinafter “*Hurstanger*”)

<sup>17</sup> [2015] EWCA Civ 186; [2015] 1 All ER (Comm) 1026 (hereinafter “*Norton Finance*”)

<sup>18</sup> *Norton Finance*, para [40].

<sup>19</sup> *Medsted HC*, para [94].

<sup>20</sup> *Medsted HC*, para [93].

<sup>21</sup> *Medsted HC*, para [94].

<sup>22</sup> *Medsted HC*, para [95].

<sup>23</sup> *Medsted HC*, para [97].

<sup>24</sup> *Medsted HC*, para [90]. See also *Medsted HC*, para [96]: “[I]t is improbable that they thought Medsted was providing its service of introducing them to Collins Stewart for nothing and so they probably assumed that Medsted was being rewarded by a share of the commission and funding rebates paid by the clients to Collins Stewart” (emphasis added).

<sup>25</sup> *Medsted HC*, para 96.

<sup>26</sup> *Medsted HC*, paras [97], [138].

<sup>27</sup> *Medsted HC*, para [132].

<sup>28</sup> *Medsted HC*, para [135].

Medsted appealed, and succeeded in part. The Court of Appeal considered, among other things, whether Medsted owed fiduciary duties to its clients and if it breached such duties. On the first point, it agreed with the lower court. Longmore LJ noted, rather laconically, that Medsted's representation that the terms offered by Collins Stewart were competitive caused the investors to repose trust and confidence in their broker, which "gives rise to a duty which can be legitimately categorised as 'fiduciary'."<sup>29</sup> On the second point it reversed the lower court decision. Drawing extensively on *Hurstanger* and *Norton Finance*, Longmore LJ opined that, due to the fact that the clients knew or ought to have known that Medsted would receive a part of the fees they were charged, it would be "an overstatement of the position" to say that Medsted's profit was secret.<sup>30</sup> This was, therefore, a "half-way house case"<sup>31</sup> where the scope of the broker's fiduciary duty did not include disclosure of the quantum of the commission.<sup>32</sup> The clients were wealthy and experienced investors who could easily have asked about the particulars of Medsted's fees, or take their business elsewhere.<sup>33</sup> On that basis, failure to make full disclosure of the unauthorised benefit was not a breach of fiduciary duty, and the public policy objection to awarding substantial damages did not apply.<sup>34</sup> Consequently, the court ruled that Medsted was entitled to recover substantial damages, and that an order to assess such damages should be made.<sup>35</sup>

#### D. ANALYSIS

Both the trial and the appellate courts used "trust and confidence" as a key indicator of the fiduciary nature of the relation between Medsted and its clients. Teare J stated that the central point to be determined in relation to the existence of fiduciary duties is "whether the clients reposed trust and confidence in Medsted".<sup>36</sup> After a cursory evaluation, he concluded that the clients reposed the requisite trust and confidence because they relied on Medsted to introduce them to CS and were vulnerable to its disloyalty or bad faith.<sup>37</sup> Longmore LJ, even more succinctly, echoed the trial judge's finding that Medsted represented to the clients that the

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<sup>29</sup> *Medsted CA*, para [33].

<sup>30</sup> *Medsted CA*, para [51]. See also paras [47], [53], [54] stating that commissions the existence of which is known could hardly be described as secret.

<sup>31</sup> *Medsted CA*, paras [37]-[38], quoting *Hurstanger* at paras [39], [45].

<sup>32</sup> *Medsted CA*, para [44].

<sup>33</sup> *Medsted CA*, para [42].

<sup>34</sup> *Medsted CA*, para [51].

<sup>35</sup> *Medsted CA*, para [52].

<sup>36</sup> *Medsted HC*, para [89].

<sup>37</sup> *Medsted HC*, para [94].

terms offered by Collins Steward were competitive, before concluding that, to the extent of such reliance, the clients reposed trust and confidence in Medsted, which gave rise to fiduciary duties.<sup>38</sup>

The courts have for a long time referred to fiduciary duties as relations of trust and confidence. For example, the celebrated and often cited statement of Millet LJ in *Mothew*, defines a fiduciary as “someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.”<sup>39</sup> In other famous words of the same justice, “confidence is the very essence of the [fiduciary] relationship. Unless a relationship is one of trust and confidence, it is not fiduciary.”<sup>40</sup> Countless similar statements can be found in fiduciary cases across common law and mixed jurisdictions.

Trust and confidence, however, are vague concepts. They are of little assistance when it comes to establishing the existence of fiduciary duties in unusual cases, such as *Medsted*. One of the reasons for this is that trust and confidence can be said to permeate many ordinary, non-fiduciary contractual relations. Finn, for instance, argues that trust and confidence in the integrity, reliability and skill of a contractual party are the foundation of the other party’s commitment to the contract.<sup>41</sup> In his view, phenomena such trust and confidence reposed or invited, dependence or reliance conceded, or ascendancy and influence acquired, are only second-degree indicators of fiduciary duties. What the court must determine using these and other relevant elements is the existence of a first-degree indicator, which in Finn’s view is a reasonable “fiduciary expectation”: one party’s expectation that the other will act in the former’s interests within the scope of their relation.<sup>42</sup> Edelman observes that, although there may be an etymological connection between the fiduciary label and the concept of trust (via the Latin *fiducia*<sup>43</sup>), “[i]t is well known that ‘fiduciary duties’ can arise despite the absence of

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<sup>38</sup> *Medsted CA*, para [32].

<sup>39</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18.

<sup>40</sup> *R v Chester and North Wales Legal Aid Area Office (No.12), Ex parte Floods of Queensferry Ltd* [1998] 1 WLR 1496 at 1500. See also *Hodgkinson v Simms* (1995) 117 DLR (4th) 161 at 173, where La Forest J of the Supreme Court of Canada wrote that “the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability.”

<sup>41</sup> Paul Finn, “Contract and the Fiduciary Principle” (1989) 12 UNSW Law Journal 76 at 86, 94.

<sup>42</sup> *Ibid.* at 93-94.

<sup>43</sup> For an in-depth analysis of the meaning of this term see Remus Valsan, “Fides, Bona Fides, and Bonus Vir: Relations of Trust and Confidence in Roman Antiquity” (2017) 5 Journal of Law, Religion and State 48.

any relationship of trust or confidence”.<sup>44</sup> Harding comments that the claim that fiduciary relationships are essentially relations of trust and confidence is mistaken.<sup>45</sup> It is perfectly possible to imagine a fiduciary relationship that arises and continues despite the absence of trust or confidence on the part of the principal. Conversely, parties trust one another in a vast range of interactions that have never been recognised in law as generating fiduciary duties.<sup>46</sup> The same idea was articulated in *Hospital Products*,<sup>47</sup> a case cited with approval in *Medsted* and in numerous other British court decisions. In that case, Gibbs CJ of the High Court of Australia stated that “an actual relation of confidence - the fact that one person subjectively trusted another - is neither necessary for, nor conclusive evidence of, the existence of a fiduciary relationship.”<sup>48</sup>

In the face of the growing academic consensus that the concepts of trust and confidence are, in themselves, largely irrelevant when determining the existence of fiduciary duties, the Court of Appeal’s continuing reliance on these elements is puzzling. *Medsted* is not an isolated case. In *Prince Arthur Ikpechukwu EZE v Conway and Another*,<sup>49</sup> a decision issued at the same time as *Medsted*, the same court used trust and confidence as key indicators of fiduciary duties in the relationship between a buyer and his agent. Lady Justice Asplin (with whom the other justices, including Longmore LJ agreed), wrote that “[t]he real question” is whether the alleged fiduciary “was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed.”<sup>50</sup> Although both decisions resort to the trust and confidence mantra, they differ significantly in how they use it in reaching their conclusion. While in *Medsted* Longmore LJ jumps straight to the conclusion that trust and confidence (alongside reliance and vulnerability) engenders fiduciary duties, Asplin LJ links this element with the scope of the authority that the alleged fiduciary has over the interests of the other party. More specifically, when trust and confidence are reposed, fiduciary duties arise only if the recipient is “someone with a *role in the decision-making*

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<sup>44</sup> The Hon Justice James Edelman, “The Role of Status in the Law of Obligations” in Andrew Gold and Paul Miller, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, 2014) 21 at 25.

<sup>45</sup> Matthew Harding, “Fiduciary Relationships, Fiduciary Law, and Trust” in D Gordon Smith and Andrew Gold, *Research Handbook on Fiduciary Law* (Cheltenham: E. Elgar, 2018) 58 at 75.

<sup>46</sup> *Ibid*, at 65-66. For a similar argument see Ernest Weinrib “The Fiduciary Obligation” (1975) 25 *University of Toronto Law Journal* 1 at 5.

<sup>47</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 1.

<sup>48</sup> *Ibid*, 69.

<sup>49</sup> [2019] EWCA Civ 88 (hereinafter “*Conway*”).

<sup>50</sup> *Ibid*, para [43].

*process* in relation to the transaction or someone who is *in a position to influence* or affect the decision taken by the principal.”<sup>51</sup> In other words, for fiduciary duties to apply, the person bound by such duties must have decision-making authority that involves discretion and exercise of judgment, as opposed to only performing a ministerial role<sup>52</sup> and merely carrying out specific instructions.<sup>53</sup> The idea that fiduciary duties are rooted in the discretionary power or authority over the interests of another is almost universally accepted in the fiduciary law theory. It has been aptly synthesised by Mason J in *Hospital Products* as follows:

The critical feature... is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.<sup>54</sup>

The element of discretion or authority was essential in reaching the conclusion in *Conway* on the fiduciary duties issue.<sup>55</sup> Because the agent performed only a ministerial role (i.e. had no scope to exercise discretion), which involved offering a pre-packaged deal, acting as a mere salesman and being bound to follow specific instructions, he was not a fiduciary and thus the law on bribery and secret commissions was not engaged.<sup>56</sup>

It is submitted, respectfully, that an analogous analysis and conclusion should have been carried out in *Medsted*. There is no evidence that Medsted’s role towards its clients involved more than simply introducing them to CS, for the purpose of trading CFDs. Teare J found no evidence that Medsted gave advice or recommendations to its clients,<sup>57</sup> which supports the idea that it played a purely ministerial role. However, the judge noted, rather cryptically, that “is to be inferred that Medsted at least impliedly represented to them that the terms offered by Collins Stewart were competitive.”<sup>58</sup> This inferred, implied representation is used in support of the argument of reliance by the clients on their broker. However, nothing is said about whether such representation is an indication of a discretionary power or decision-

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<sup>51</sup> Ibid, emphasis added.

<sup>52</sup> Ibid, para [22].

<sup>53</sup> Ibid, para [40]. For a similar argument see Remus Valsan, “Fiduciary Duties, Conflict of Interest and Proper Exercise of Judgment” (2016) 62:1 McGill Law Journal 1; Lionel Smith, “Deterrence, Prophylaxis and Punishment in Fiduciary Obligations” (2013) 7 Journal of Equity 87.

<sup>54</sup> (1984) 156 CLR 41 at 96-97.

<sup>55</sup> Although neither the trial nor the appellate courts used precisely these terms, their references to a “decision-making role” and “ability to influence the interests of the other” can be considered close synonyms.

<sup>56</sup> *Conway*, paras [43], [47].

<sup>57</sup> *Medsted HC*, para [93].

<sup>58</sup> Ibid. See also *Medsted CA*, para [32].



making authority that Medsted may have had over the interests of its clients. Had the judge determined the presence of such power or authority, the imposition of fiduciary duties would have been a clear and logical conclusion. For this reason, it is respectfully submitted that the Court of Appeal's analysis of the existence of fiduciary duties is unsatisfactory. It would have been preferable to follow the pattern of analysis in *Conway* and investigate whether Medsted had a mere ministerial role, or had scope for exercise of decision-making power over the investors' interests. It is likely that this approach would have led to the same result, but on a more principled basis: if Medsted had no discretion then no fiduciary duties arose, and the public policy grounds for denying substantial damages would not have applied.

Finally, a word of caution is sounded as regards the Court of Appeal's analysis of the scope of Medsted's fiduciary duties. The court ruled that, because the clients were aware (or must have been) that Medsted was remunerated by CS, the commission was only half-secret and thus no further disclosure or express consent were necessary. This may lead to a dangerous and unwarranted relaxation of the no-conflict and no-profit rules. It is a fundamental feature of fiduciary law that these rules are exacting<sup>59</sup> and should be "strictly pursued, and not in the least relaxed."<sup>60</sup> The law on halfway-house fiduciary duties is an encroachment on this fundamental principle and, given the absence of clear precedents, should be developed cautiously. As Tuckey LJ put it in *Hurstanger*,<sup>61</sup>

Is there a half-way house between the situation where there has been sufficient disclosure to negate secrecy, but nevertheless the principal's informed consent has not been obtained?... There is no authority which sheds any light on this question.

The *Bowstead and Reynolds* paragraph on which both courts relied is tentative on this point.

In halfway-house relations where no usage or custom is involved,<sup>62</sup> "the principal's knowledge [of the secret profit] may require to be more specific."<sup>63</sup> The court interpreted this

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<sup>59</sup> *Parker v McKenna* (1874) LR 10 Ch App 96 at 124-125 ("[N]o agent in the course of his agency... can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court..."); *Bray v Ford* [1896] AC 44 at 51 ("It is an inflexible rule... that person in a fiduciary position... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict").

<sup>60</sup> *Keech v Sandford* (1726) Sel Cas Ch 61 at 63.

<sup>61</sup> *Hurstanger*, para [39].

<sup>62</sup> No trade usage or custom were relied on in *Medsted*.

<sup>63</sup> Peter G. Watts, ed, *Bowstead and Reynolds on Agency*, 21<sup>st</sup> ed (London: Sweet & Maxwell, 2018), para 6-086. The full paragraph reads: "where [the principal] leaves the agent to look to the other party for his remuneration or knows that he will receive something from the other party, he cannot object on the ground that he did not know the precise particulars of the

sentence as linking the extent of disclosure to the degree of sophistication of the client.

Where the client is likely to be vulnerable and unsophisticated (as it was the case in *Hurstanger*) full disclosure may be required. This was not, in its view, the case in *Medsted*, where “*it is likely* that [the clients] were experienced investors.”<sup>64</sup> The court’s interpretation is unsatisfactory for two reasons. First, as mentioned in the summary of the facts, it was not determined with certainty that the clients knew about Medsted’s commission. Likewise, it was not determined that the clients were knowledgeable or sophisticated in CFDs. Second, the judge clearly found that Medsted had gone out of its way to withhold from its clients the information regarding its share of the commission. Therefore, this was a case of deliberate withholding of information which clearly would have been relevant to investors.

Consequently, there is an obvious inconsistency in finding that the parties were in a fiduciary relation, yet the deliberate withholding of relevant information was not a breach of fiduciary duty.

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amount paid. Such situations often occur in connection with usage and custom of trades and markets. Where no usage is involved, however, the principal’s knowledge may require to be more specific.”

<sup>64</sup> *Medsted CA*, para [42], emphasis added.